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Before the

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35316

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**ALLIED ERECTING AND DISMANTLING, INC. AND
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION -
PETITION FOR DECLARATORY ORDER**

**REPLY OF RESPONDENTS
TO MOTION TO FILE SECOND SUPPLEMENT TO PETITION**

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Railroad, Inc., et al.

Dated: April 29, 2010

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Respondents hereby reply to the Motion filed by Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (collectively, "Allied") on April 19, 2010, seeking to allow a second supplement to its Petition for Declaratory Order.¹ This Motion and the proposed second supplement is yet another attempt by Allied to expand the issues of this proceeding beyond the scope of the issues referred by the Ohio state court. Allied's proposed second supplement is simply an opinion and order of a United States District Court (the "March 15 Order") in an unrelated dispute between the same parties. Because the March 15 Order and the issues addressed therein (and erroneously characterized in the Motion) are irrelevant and immaterial to the proceeding at hand, and likely to confuse the issues, the Motion should be denied. In support of their Reply, Respondents state as follows:

This matter at issue in this proceeding was referred to the Board by an Ohio state court judge in connection with a lawsuit filed by Allied against Respondents claiming that the use of certain rail lines and tracks on specific parcels of property owned by Allied, were limited by the terms of particular easement agreements (the "P&LE Easement" and the "LTV Easement").

¹ Respondents note that service was made on only one of two co-counsel for Respondents, and was not made on counsel for Youngstown & Southeastern Railway Company.

The specific questions referred to the Board as set forth in the state court referral order are:

- (a) Do the issues regarding [Respondents] stopping or storing cars on the rail lines in question, in alleged violation of the easement agreements, fall within the jurisdiction of the STB?
- (b) Do the easements in question allow the [Respondents] to store or stage rail cars on the lines covered by those easements?
- (c) If the [Respondents] have violated the easement agreements what damages are available to [Allied]?

The issues in the federal court case referenced by Allied relate to a second action (“Allied II”) filed by Allied seeking to eject Respondents from a different piece of property; no easement agreements are involved. In Allied II, Respondents removed the case to federal court claiming, *inter alia*, that the relief requested by Allied would require certain railroad Respondents to abandon lines of railroad on the property, and that such relief was preempted by the ICC Termination Act. While the federal case involves the same parties as the state court case, it most certainly does not, as alleged by Allied, involve the same underlying factual controversy.

Moreover, the March 15 Order did not find that Allied’s state law claims are not preempted as Allied asserts (Allied Motion at 2); rather, it found only that there was not “complete preemption” and that the case therefore was not properly removed under the well-pled complaint rule.² In fact the March 15 Order specifically found:

To clarify, the conclusion that ICCTA does not “completely preempt” Allied Industrial’s state-law claims applies only to the jurisdictional question. ... **The Court does not resolve the separate issue of whether**

² Respondents disagree with the District Court on this issue since the requested relief would interfere with the use of railroad tracks and require abandonment of lines of railroad under the jurisdiction of the Board. The District Court’s conclusions are not consistent with decisions of the Board in similar circumstances. *See Mark Lange – Petition for Declaratory Order*, STB Finance Docket No. 35037 (served January 28, 2008); *Joseph R. Fox – Petition for Declaratory Order*, STB Finance Docket No. 35161 (served May 18, 2009).

the ICCTA's preemption clause provides a defense to Allied Industrial's claims – an issue that the defendants are free to raise in the state court.

March 15 Order at 6-7 (citation omitted) (emphasis added).³

Accordingly, since the issues raised in the proposed second supplement are unrelated to, and irrelevant and immaterial to the issues raised in this proceeding, Respondents request that the Board deny Allied's Motion to File Second Supplement.

Respectfully submitted,



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³ Now that Allied II has been remanded to state court, Respondents expect that they will re-file in state court their motion to dismiss or for referral to the Board. Thus, Respondents acknowledge that the issues in Allied II may well end up before the Board. However, even if the questions raised in Allied II are referred, the factual and legal issues in Allied II are not related to, and should not be consolidated with, the issues in this declaratory order proceeding. Instead, Respondents expect that any such referral would be considered in an independent proceeding.


CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2010, a copy of the foregoing Reply of Respondents upon the following persons by US first class mail, postage prepaid, and by email:

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